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### An Appraisal of Judicial Reluctance to Imply an Indemnity Contract in Time-Barred Breach of Warranty Suits

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Once a court has jurisdiction, its power should not be frustrated by venue provisions unless the purpose behind those provisions is being served.

The *Rutland* case, like the *Mason* case, indicates a tendency of the federal courts, at least in the Second Circuit, to accept the realities of business forms when resolving issues of venue and jurisdiction, a tendency which has been all too long delayed.



## AN APPRAISAL OF JUDICIAL RELUCTANCE TO IMPLY AN INDEMNITY CONTRACT IN TIME-BARRED BREACH OF WARRANTY SUITS

### *Introduction*

In a New York action a third-party plaintiff has the right to indemnity only when he can show that (as between himself and the third-party defendant) there exists the relationship of "active-passive" tort-feasor or there is an express contract to indemnify. This comment will endeavor to demonstrate that the current limitation on an indemnity cause of action is unreasonable, and further that it fosters injustice and encourages collusive fraud, especially when the statute of limitations has run on the underlying cause of action.

### *New York Case Law*

In a recent case<sup>1</sup> the defendant, a general contractor under contract with plaintiff to construct a building, was sued for damages for non-compliance with specifications regarding the installation of a fuel tank. Plaintiff alleged that the improper installation caused the tank to become corroded and thus unfit for use. Under CPLR 1007 the defendant impleaded its subcontractor, who had installed the tank, seeking indemnification for any possible liability to the plaintiff. More than six years had elapsed since the execution of the contract between the contractor (third-party plaintiff) and the subcontractor (third-party defendant). In dismissing the third-party complaint the court held that the statute of limitations barred any action thereon. Defendant-contractor contended that the statute of limitations<sup>2</sup> did not bar the suit since the third-party cause of action was one for indemnity, which would accrue only

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<sup>1</sup> *City & County Sav. Bank v. M. Kramer & Son*, 43 Misc. 2d 731, 252 N.Y.S.2d 224 (Sup. Ct. 1964).

<sup>2</sup> CPLR 213.

when plaintiff obtained judgment against the defendant and defendant paid that judgment.<sup>3</sup> In rejecting this contention, the Supreme Court, Albany County, merely stated that, as a matter of substantive law, there was no basis for an indemnity claim at bar; that the third-party cause of action was one for simple breach of contract; that the breach occurred at the time of installation; and that, measured from that time, the contractual period of limitations had expired and the third-party action was barred.

This holding appears to find support in *C.K.S., Inc. v. Helen Borgenicht Sportswear, Inc.*<sup>4</sup> There the third-party summons and complaint were served in 1963. The complaint alleged that in 1956 the third-party plaintiff purchased cloth from the third-party defendant, which proved to be unfit for its intended use and caused injury to the plaintiff in the main action. The third-party plaintiff pleaded an indemnity cause of action. The court held that the only cause of action was in breach of warranty and that it was barred by the six-year statute of limitations.

The result of these holdings is that the defendant (third-party plaintiff) is prevented from making himself whole against the party who, he contends, is truly at fault, because though the main plaintiff's cause of action against the defendant is timely ✓ interposed, the impleader cause of action is not. If indemnity is not allowed, the effect is to immunize the actual wrongdoer by compelling the party, whom we may describe as only "passively" liable (by analogy to the tort realm), to make good for the active wrongdoer's conduct. The query then is: Does no implied indemnity agreement arise in such a situation? Stated differently: Will a cause of action in indemnity lie when the basis for the "action-over" is not tortious conduct, but breach of contract or breach of warranty?

The courts in the State of New York have replied negatively to these questions in the few instances where the problem arose. They have confined the "indemnity" action, allowance of which would solve the third-party plaintiff's statute of limitations dilemma, to cases involving "active" and "passive" *negligence* and express contracts to indemnify.<sup>5</sup> However, the contention that an action for indemnity is proper in breach of warranty and contract areas

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<sup>3</sup> See *Valstray Serv. Corp. v. Board of Elections*, 2 N.Y.2d 413, 141 N.E.2d 565, 161 N.Y.S.2d 52 (1957).

<sup>4</sup> 22 App. Div. 2d 650, 253 N.Y.S.2d 56 (1st Dep't 1964).

<sup>5</sup> See *Liberty Mut. Ins. Co. v. Sheila-Lynn, Inc.*, 185 Misc. 689, 57 N.Y.S.2d 707 (Sup. Ct. 1945), *aff'd*, 270 App. Div. 835, 61 N.Y.S.2d 373 (1st Dep't 1946); *Dolgoft v. Schnitzer*, 209 App. Div. 511, 205 N.Y. Supp. 11 (1st Dep't 1924).

without an express contract to indemnify is not without judicial recognition.

In *W.T. Grant Co. v. Uneeda Doll Co.*<sup>6</sup> the plaintiff, a Connecticut retailer, instituted suit for breach of warranty against the New York manufacturer from whom it purchased dolls for resale in Connecticut. The plaintiff alleged that a breach of warranty suit was pending against it in Connecticut, brought by a purchaser whose child was injured while playing with one of the defendant's dolls. Plaintiff contended that if it were found liable for breach of warranty and had to pay damages in that action, it would be because of the defendant's breach of warranty and, therefore, the defendant would be liable to it for the amount of the Connecticut judgment. Special term construed the plaintiff's complaint as stating a cause of action in *indemnity*, and dismissed the action because there was no showing of payment by the plaintiff. On appeal, the appellate division, first department, reversed, holding that the complaint stated a good cause of action for *breach of warranty* and that the action was not premature in view of the fact that CPLR 3014 allows hypothetical pleadings.<sup>7</sup> However, in his dissenting opinion, Justice Eager indicated that he would affirm the decision of the special term on the ground that the complaint stated a cause of action in *indemnity*, and such claim was at that time premature. He declared that "on the face of the complaint, the cause pleaded is one for *indemnification* in the event that in the future there is a recovery against the plaintiff in the pending action . . . but . . . a cause [of action] for indemnification has not yet accrued."<sup>8</sup>

Therefore, following the reasoning of Justice Eager, even though the wrongful conduct which gave rise to the plaintiff's liability was breach of warranty and not negligence, if the plaintiff had paid the judgment in Connecticut (either voluntarily, or by order of a court) he could have obtained indemnification against the defendant. Likewise, if the claim were interposed by way of a third-party pleading in a New York litigation, the pleading would be sustained on an *indemnity* theory, because CPLR 1007 allows a defendant to implead a third party *only* if that third party would be required to indemnify him. If the breach of warranty would be so interposable on the indemnity theory *required* by CPLR 1007, why should third-party plaintiff be deprived of the indemnity theory by the statute of limitations?

In *Schubert v. August Schubert Wagon Co.*,<sup>9</sup> Judge Cardozo pointed out that it is not the legal liability, but the *loss* which is determinative in deciding whether a cause of action for indemnity

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<sup>6</sup> 19 App. Div. 2d 361, 243 N.Y.S.2d 428 (1st Dep't 1963).

<sup>7</sup> *Id.* at 363, 243 N.Y.S.2d at 430.

<sup>8</sup> *Id.* at 364, 243 N.Y.S.2d at 431. (Emphasis added.)

<sup>9</sup> 249 N.Y. 253, 164 N.E. 42 (1928).

will lie. Such being the case, it would appear immaterial whether the underlying wrong was a breach of warranty or negligence. (In *Schubert* it was negligence.) This is illustrated by *Dunn v. Uvalde Asphalt Paving Co.*,<sup>10</sup> where the court stated that "indemnity rests upon the principle that every one is responsible for his own wrong, and if another person has been compelled to pay the damages which the wrongdoer should have paid, the latter becomes liable to the former."<sup>11</sup> All of that reasoning has equal vigor in the breach of warranty suit.

The Restatement of the Law of Restitution offers further evidence of the all-encompassing breadth of the indemnity action; "a person who, in whole or part, has discharged a duty which is owed by him, but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other. . . ." <sup>12</sup> In *Brown v. Rosenbaum*,<sup>13</sup> Chief Judge Lehman cited the above section of the Restatement and indicated that it correctly reflected the law in New York.<sup>14</sup> He stated that when "payment by one person is compelled, which another should have made . . . a contract to reimburse or indemnify is implied by law."<sup>15</sup> There is nothing in the breach of warranty situation that would countenance a disregard of that implication.

### *The Federal Approach*

In recent years the federal courts have recognized the wide scope of the indemnity cause of action and have moved away from the practice of allowing indemnity in only "active" and "passive" tort-feasor situations. Indemnity has been granted when the courts have discovered a breach of a "consensual obligation" between the parties. This is particularly true in the numerous cases where shipowners have had to pay damages for injuries sustained aboard their ships and would have been denied indemnity against the stevedores who created the unsafe conditions because of the exclusive tort liability provisions of the Longshoremen and Harbor Workers' Compensation Act.<sup>16</sup>

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<sup>10</sup> 175 N.Y. 214, 67 N.E. 439 (1914).

<sup>11</sup> *Id.* at 217, 67 N.E. at 439.

<sup>12</sup> RESTATEMENT, RESTITUTION § 76 (1937).

<sup>13</sup> 287 N.Y. 510, 41 N.E.2d 77 (1942).

<sup>14</sup> *Id.* at 518, 41 N.E.2d at 80.

<sup>15</sup> *Id.* at 518-19, 41 N.E.2d at 81. (Emphasis added.) For further evidence of the immateriality of the underlying cause of action, see *Boston Woven-Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 59 N.E. 657 (1901); see also *Degnon Contracting Co. v. City of New York*, 202 App. Div. 390, 196 N.Y. Supp. 63 (1st Dep't 1922), modified, 235 N.Y. 481, 139 N.E. 580 (1923).

<sup>16</sup> 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1958); 64 Stat. 1271 (1950), 33 U.S.C. § 933 (1958). For discussions of some of the more important cases, see generally Kolius & Cecil, *Indemnity Suits By Vessel Owner Against Stev-*

Recognizing the inequity in immunizing the actual wrongdoer, the United States Supreme Court in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*<sup>17</sup> granted indemnity to a shipowner. The Court concluded that an agreement to perform stevedoring operations gives rise to a "consensual obligation" on the part of the stevedoring company to perform their functions safely and properly and that a breach of this "consensual obligation" will give rise to a cause of action for indemnity. According to the Court this right of indemnity "springs from an independent contractual right" and does not arise because of negligence.<sup>18</sup>

A more general statement of the *Ryan* rationale is found in *Curtis v. A. Garcia Y Cia.*<sup>19</sup> The court stated that the

undertaking of an independent contractor to perform a job carries with it a promise, implied in fact, that the operation will be conducted in a safe, skillful and generally workmanlike manner. Though such a contract may contain no express agreement to indemnify, a breach of this warranty of workmanlike performance, which results in loss to the owner by way of liability to a third person in damages, is redressed by imposing an obligation to indemnify upon the responsible contractor.<sup>20</sup>

Also indicative of this trend is the language employed by the court in *United States v. Savage Truck Line, Inc.*<sup>21</sup>

The existence of a contractual relationship between joint wrongdoers, and the breach of the duty by the one burdened therewith in the course of performing a separate and independent act without which the injury would not have occurred, are weighty circumstances in identifying the principal offender and saddling him with the liability of an indemnitor.<sup>22</sup>

It is submitted that the rationale of these cases is readily applicable to the principal cases (*City & County Sav. Bank v. M. Kramer & Son*<sup>23</sup> and *C.K.S., Inc. v. Helen Borgenicht Sportswear, Inc.*<sup>24</sup>). For example, in the *Kramer* case, under the contract between the third-party plaintiff and the third-party defendant, the responsibility for proper installation was upon the subcontractor.

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*edoring Contractor: A Search For The Limits of The Ryan Doctrine*, 27 INS. COUNSEL J. 282 (1960); Ray, *The Liability of the Shipowner for Injuries Aboard Ship to Shoreside Workers and the Shipowner's Right to Indemnity Against Such Workers' Employers*, 27 INS. COUNSEL J. 642 (1960).

<sup>17</sup> 350 U.S. 124 (1956). See also *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958).

<sup>18</sup> *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 131-32 (1956).

<sup>19</sup> 272 F.2d 235 (3d Cir. 1959).

<sup>20</sup> *Id.* at 237.

<sup>21</sup> 209 F.2d 442 (4th Cir. 1953).

<sup>22</sup> *Id.* at 447.

<sup>23</sup> *Supra* note 1.

<sup>24</sup> *Supra* note 4.

He did not install properly and thus breached the contract. That breach was the proximate cause of the breach of the original contract thus giving rise to the defendant's (third-party plaintiff's) liability to the main plaintiff. Applying the *Ryan* rationale we can say that the third-party defendant has breached an independent "consensual obligation" which in turn has given rise to defendant's third-party plaintiff's liability, and therefore, should be cloaked in the garb of indemnitor in order to prevent an obvious injustice.

### Conclusion

It can therefore be concluded: (1) that the current New York practice of limiting indemnity to only those situations involving "active" and "passive" tort-feasors serves no legitimate end; in a great many instances it operates only to insulate the actual wrongdoer; (2) that within the concept of the indemnity cause of action there is no inherently prohibitive element which would bar its application in a breach of contract or breach of warranty situation; (3) that in all situations where indemnity is allowed the court is seeking to do what is just and equitable based upon the relationship of the parties. Therefore, in determining whether or not indemnity should be allowed in a particular case, the court's primary consideration should be the effect of its disallowance.

After reviewing the cases and authorities on the subject it appears that in the "active-passive" negligence area (the traditional area in which the obligation to indemnify is implied) the allowance of the action is based upon the law's notion of what is fair and proper between the parties; and that by implying the indemnity cause of action the courts were seeking to deny unjust enrichment to the party who is actually at fault.<sup>25</sup> As Professors Meriam and Thornton have pointed out, the allowance of the indemnity cause of action, in the early New York cases involving "active" and "passive" negligence, was a manifestation of the inherent notions of *fairness* in the minds of the judiciary, struggling to find expression.<sup>26</sup> The courts in these early cases sought to place the blame on the *actual wrongdoer* under the principle that no one should be permitted to escape the consequences of his own wrongful conduct.<sup>27</sup> It was logic which impelled the courts to imply

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<sup>25</sup> See Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 147 (1932); see also Bohlen, *Contribution and Indemnity Between Tortfeasors*, 22 CORNELL L.Q. 469 (1937); Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517 (1952); PROSSER, TORTS § 48 (3d ed. 1964).

<sup>26</sup> Meriam & Thornton, *Indemnity Between Tortfeasors: An Evolving Doctrine in the New York Court of Appeals*, 25 N.Y.U.L. REV. 845, 848 (1950).

<sup>27</sup> *Village of Port Jervis v. First Nat'l Bank*, 96 N.Y. 550, 555-56 (1884).

an indemnification contract in order to mitigate the harshness of common-law doctrines which imposed liability without fault.<sup>28</sup>

There is, therefore, ample common-law basis whereby the courts can, and there are compelling reasons of fairness which dictate that the courts should, imply the obligation of the actual wrongdoer to indemnify the one who has been obliged by law to make good for something that is really the sole fault of the former. If this indemnification theory is adopted by the courts, the statute of limitations, used so unjustly in the main cases, would pose no problem. The "indemnity" claim would not arise until payment by the one seeking indemnity, and in the impleader context there would, therefore, be no statute of limitations pleadable by the wrongdoer as a defense. The main cases permit the actual wrongdoer to use the statute of limitations against one to whom the law was never intended to apply. The one asserting the claim here is not guilty of delay. There was no claim against the actual wrongdoer *until* the third-party plaintiff was sued by the injured party. Even were he to bring his third-party action at the earliest possible moment, the rule of the main cases may require the holding that he is already barred by the statute of limitations.

For example, *M* (manufacturer) sells items to *R* (retailer) on April 1, 1958. *R* puts them in stock and on June 1, 1958, *R* sells one to *P*. *P* sues for breach of warranty on June 1, 1964. *R* is barred by the statute of limitations from indemnifying himself against *M* because, under the cases, there is no indemnity obligation. There is only a breach of warranty, which is held to run against *R* from the time of the sale from *M* to *R*, not from *R* to *P*. Such a situation presents not merely an injustice, but a possibility of collusive wrongdoing between *P* and *M* to which the judicial doors should be tightly shut. If *M* approached *P* after hearing of a dispute between *P* and *R*, *M* could have prevailed upon *P* to delay suit against *R* until after April 1, 1964. On that date the cause of action against *R* would be alive, but that which *R* might have against *M* would be dead. It is no answer to say that such instances will be uncommon (even in view of the recent removal of the privity requirements in warranty cases). The reply is that, as to dates, there was just such a situation in the main cases.

✓ It took no legislation to bring about the implied obligation to indemnify in the active-passive tort-feasor sphere. In our even more enlightened age, it should require no legislation for the courts to extend this theory to the area of breach of warranty.

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<sup>28</sup> Leflar, *supra* note 25, at 148.